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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)
)
Revision of the Commission's Rules to Ensure)
Compatibility with Enhanced 911 Emergency)
Calling Systems)

CC Docket No. 94-102

To: The Commission

**ALLTEL COMMUNICATIONS, INC.
PETITION FOR RECONSIDERATION**

Pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, ALLTEL Communications, Inc. ("ALLTEL") hereby respectfully requests the Commission to reconsider one aspect of its July 26, 2002 *Order to Stay* in the above-referenced proceeding.¹ Specifically, ALLTEL asks that the Commission reconsider its decision to hold carriers strictly liable for failure to "have compliant Phase II service available on the dates set forth [t]herein" or face enforcement action.² ALLTEL believes that both as a legal matter and as a practical matter, where carriers have missed the established deadline through no fault of their own, carriers must be afforded a meaningful opportunity to demonstrate why noncompliance should be excused before the Commission deems a carrier in noncompliance with the *Order to Stay*.

I. ALLTEL STILL HAS ONLY LIMITED POWER OVER ITS VENDORS

ALLTEL is committed to deploying Phase II service to capable PSAPs in accordance with the deadlines imposed on Tier II carriers set forth in the *Order to Stay*. As the record

¹ See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, Order to Stay*, CC Docket No. 94-102, FCC 02-210 (rel. July 26, 2002) ("*Order to Stay*"). ALLTEL is submitting the instant filing in both paper form and electronically.

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demonstrates, notwithstanding the limitations faced by Tier II carriers, ALLTEL has moved to aggressively deploy Phase I and Phase II capabilities in its network.³ ALLTEL has already begun selling and activating ALI-capable handsets and implementing network upgrades throughout its Lucent and Nortel switches; it has further committed to aggressively convert markets recently acquired from CenturyTel from TDMA to CDMA and, in the process, expeditiously incorporate Phase II technologies into that CDMA buildout. Indeed, ALLTEL has already initiated testing efforts in the Jacksonville, Florida market and has actively sought to test Phase II equipment and software with vendors.

Nevertheless, as the Commission found, “there are technical and equipment availability problems that prevent small and mid-sized carriers from implementing E911 Phase II pursuant to the current deadlines” and “nationwide carriers have received the vast majority of attention from E911 Phase II network and handset technology vendors.”⁴ The Commission thus appropriately found that the record warranted revised deployment deadlines for ALLTEL and other Tier II carriers. The very factors underlying the Commission’s decision – carriers’ dependence on the activities of handset, network, and solution vendors, and consumers – also constitute the very “extraordinary circumstances” that may warrant “additional relief . . . in the requirements, schedules, and benchmarks imposed [t]herein.”⁵ For example, Verizon Wireless and Sprint PCS have recently brought to the Commission’s attention the important role that LECs play in Phase

² *Id.* at ¶ 37. To the extent necessary, ALLTEL also seeks reconsideration of ¶ 44 of the *Order to Stay*, which formally imposes the relevant conditions on Tier II carriers.

³ See ALLTEL Communications, Inc. Petition for Waiver, CC Docket No. 94-102 (filed July 25, 2001), Supplement (filed November 30, 2001), Second Supplement (filed April 18, 2002).

⁴ See *Order to Stay* ¶¶ 17, 20, nn. 32-33.

⁵ See *id.* ¶ 36.

II deployment and in meeting carriers' ability to provide service to PSAPs.⁶ Given the initial March 1, 2003 deadline to commence Phase II service for certain PSAPs,⁷ and the comprehensive record before the Commission documenting carriers' experience with vendors, the availability of a bona fide "safety valve" procedure for ALLTEL is critical. Simply put, ALLTEL believes that it would be a waste of Commission and carrier resources to move directly to enforcement under strict liability prior to the Commission's determination as to whether extraordinary circumstances justifying delay exist in the first instance.

II. THE COMMUNICATIONS ACT, COMMISSION RULES AND PRINCIPLES OF DUE PROCESS AND ADMINISTRATIVE LAW REQUIRE THAT ALLTEL HAVE A MEANINGFUL OPPORTUNITY TO SEEK FURTHER WAIVER BEFORE BEING FORCED TO CHALLENGE A FINDING OF NONCOMPLIANCE.

The Commission asserts that Tier II and Tier III carriers "*will be* deemed noncompliant" if they do not "have compliant Phase II service available" in accordance with the requirements set forth in the *Order*. Moreover, the unavailability of compliant equipment from vendors will only be a possible *mitigation* factor for the Enforcement Bureau's consideration:

At that time, an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance. However, a carrier's "concrete and timely" actions taken with a vendor, manufacturer, or other entity may be considered as possible mitigation factors in such an enforcement context.⁸

⁶ See Verizon Wireless *Ex Parte* Presentation in CC Docket No. 94-102, dated August 19, 2002; Sprint PCS *Ex Parte* Presentation in CC Docket No. 94-102, dated August 13, 2002. The Commission has also recently requested information in this regard from certain ILECs. While many of the LEC-provisioned facilities are the PSAP's, rather than carrier's responsibility, Sprint PCS and Verizon Wireless have highlighted the complexities of Phase II deployment and the factors beyond wireless carriers' that may delay service.

⁷ See *Order to Stay* ¶ 27 (requiring Tier II carriers to "[b]egin delivering Phase II enhanced service to the PSAP" "within six months or by March 1, 2003, whichever is later").

⁸ *Id.* ¶ 37.

Thus, by the terms of the *Order to Stay*, the acts or omissions of third parties, including vendors and LECs, do not constitute “extraordinary circumstances” excusing noncompliance. Even if the penalty imposed on a carrier is lessened as a result of such “concrete and timely” actions, any finding of noncompliance in itself is of great concern to a responsible cellular and broadband PCS licensee such as ALLTEL.⁹

Fundamental principles of fairness require that the Commission provide ALLTEL “a meaningful opportunity to challenge [its] decision” and, at a minimum, to demonstrate why excusal is warranted.¹⁰ The Commission must at some point take these core principles into account consistent with Section 503(b)(4) of the Act, which requires, in relevant part, that:

[N]o forfeiture penalty shall be imposed under this subsection against any person unless and until . . . the Commission issues a notice of apparent liability, in writing, with respect to such person; [and] such person is granted an opportunity to show . . . why no such forfeiture penalty should be imposed.¹¹

Section 503 expressly affords ALLTEL the right to demonstrate that a finding of noncompliance is not warranted, as indicated by Section 503’s requirement that the Commission provide notice of “*apparent liability*.”¹² Section 1.80 of the rules implements Section 503’s these requirements and the Commission must abide by them.¹³

Yet the Commission’s approach would deem a carrier in noncompliance where compliance is not possible, and notwithstanding a carrier’s good faith compliance efforts – a

⁹ See 47 C.F.R. §§ 22.940(a), 24.16(b) (“substantial compliance” a prerequisite for obtaining renewal expectancy).

¹⁰ See *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997) (“Notice and a meaningful opportunity to challenge the agency’s decision are the essential elements of due process.”).

¹¹ 47 U.S.C. § 503(b)(4).

¹² See *Liability of Altavista Broadcasting Corp.*, 2 FCC 2d 445, ¶ 7 (1966) (citing S. Rep. 1857, 86th Congress, 2d session, at 8-10) (“a notice of apparent liability is not a finding of liability”).

¹³ See 47 C.F.R. § 1.80(f)(3).

result contrary to Commission and judicial precedent.¹⁴ When an agency's rulemaking decisions stem from its exercise of "predictive judgment," it must afford its regulatees meaningful "safety valve" procedures in the event its predictions prove inaccurate. Consistent with this principle, the Commission has traditionally afforded relief from deadlines when compliance is infeasible due to the lack of available equipment from vendors or where technical difficulties arise.¹⁵ In fact, the Commission just recently extended the deadline for a number of carriers to deploy digital-TTY compatibility in their networks for this very reason.¹⁶

In contrast, the Commission's enforcement approach in the *Order to Stay* goes well beyond these basic principles. Commission-imposed deadlines, particularly when based on the

¹⁴ See *Midwest Radio-Television, Inc.*, 45 F.C.C. 1137, 1141 (1964) (policy underlying "willful" noncompliance definition to address licensees' "lack of concern or indifference" or "laxity" and where "violations could, and indeed should, have been easily avoided"); H.R. Rep. No. 97-765, at 50-51 (1982) (Congress intended to incorporate *Midwest Radio-Television* standard into Sections 312 and 503 of Act); see also *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991); *Hughey v. JMS Development Corp.*, F.3d 1523, 1530 (11th Cir. 1996); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1294 (9th Cir. 1977) citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

¹⁵ See, e.g., *Telephone Number Portability, Petitions for Extension of the Deployment Schedule for Long-Term Database Methods for Local Number Portability, Phase II*, 13 FCC Rcd. 9564, 9568 ¶ 18, 9570 ¶ 25 (1998); *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability*, WT Docket No. 01-184, CC Docket No. 95-116, *Memorandum Opinion and Order*, FCC 02-215 ¶ 24-25 (rel. July 26, 2002); *Roosevelt County Rural Telephone Cooperative, Inc.*, 13 FCC Rcd. 22, ¶¶ 29-36 (1997); *Cuba City Telephone Exchange Company et al.*, 12 FCC Rcd. 21794, ¶¶ 16-25 (1997); *C, C & S Telco, Inc. et al.*, 6 FCC Rcd. 349, ¶¶ 6, 12 (1991); *Policies and Rules Concerning Operator Service Providers*, 5 FCC Rcd. 4630, ¶ 22 (1990); *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 - Compatibility Between Cable Systems and Consumer Electronics Equipment*, 9 FCC Rcd. 1981, ¶¶ 76-77 (1994); *Garmin International Inc.*, Order, DA 02-2033, ¶ 5 (WTB rel. Aug. 21, 2002); *EarthWatch Inc.*, 15 FCC Rcd. 18725, ¶¶ 6-8 (Int'l Bur. 2000).

¹⁶ *Revision of the Commission's Rules To Ensure Compatibility with the Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Order, DA 02-1540, ¶¶ 17-18 (rel. June 28, 2002) ("[the carriers'] requests for limited waivers based on vendor delays are well-supported by the evidence[,] and "requiring compliance with the [initial deadline] would be unduly burdensome and in many instances not feasible, despite the best efforts of the carriers.").


agency's predictive judgment, must have a record basis;¹⁷ in this case, the deadlines are based on the Commission's record-based prediction that vendors will, in fact have compliant products available.¹⁸ If, however, these predictions prove inaccurate, the Commission must revisit the deadlines accordingly¹⁹ and, moreover, must afford carriers recourse to meaningful waiver procedures.²⁰ ALLTEL only asks that the Commission modify the *Order to Stay* accordingly.

III. CONCLUSION

For the foregoing reasons and to the extent discussed herein, the Commission should reconsider its decision in the *Order to Stay*.

Respectfully submitted,

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¹⁷ See *AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1140 (D.C. Cir. 1984)); *ASG Industries Inc. v. CPSC*, 593 F.2d 1323, 1335 (D.C. Cir. 1979); *National Ass'n of Indep. Television Producers and Distributors v. FCC*, 502 F.2d 249, 254 (2d Cir. 1974) (effective date may not be "arbitrary or unreasonable").

¹⁸ See *Order to Stay* ¶¶ 16-17.

¹⁹ *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991); *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982); see *Bechtel*, 957 F.2d 873, 881 (D.C. Cir. 1992); *P&R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984).

²⁰ See *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (citing dissenting opinion in *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1200 (D.C. Cir. 1983)); *WAIT Radio*, 418 F.2d at 1158; see also *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784-86 (1968)).